

LEGISLATIVE ASSEMBLY

Read 1° 29 April 1981

(Brought in by Mr Maclellan and Mr Thompson)

A BILL

Relating to Conditions and Warranties in certain Sales and Leases, to amend the *Goods Act* 1958 and for other purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to

5 say):

1. (1) This Act may be cited as the *Goods (Sales and Leases) Act* 1981. Short title.

(2) In this Act, the *Goods Act* 1958 is called the Principal Act. Principal Act
No. 6265.

10 (3) This Act shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*. Reprinted to
No. 8425.
Commence-
ment.

2. (1) In section 1 of the Principal Act after the expression "Part III.—Effect of Execution and Conviction on Title to Goods ss. 82–83A." there shall be inserted the expression— Amendment of
No. 6265.
S. 1 and new
Part IV.

15 "Part IV. — Implied
Conditions and
Warranties in
Certain Sales and
Leases ss. 84–119." } Division 1.—Introductory s. 84–85.
Division 2.—Sales ss. 86–102.
Division 3.—Leases ss. 103–112.
Division 4.—General ss. 113–119."

(2) After Part III. of the Principal Act there shall be inserted the following Part :—

‘ PART IV.—IMPLIED CONDITIONS AND WARRANTIES IN CERTAIN SALES AND LEASES.

DIVISION 1.—INTRODUCTORY.

		5
Interpretation.	84. (1) In this Part, unless inconsistent with the context or subject-matter—	
“ Buyer.”	“ Buyer ” in relation to a sale of goods and services, means the person to whom the goods and services are, or are to be, sold.	10
“ Court.”	“ Court ” has the same meaning as in the <i>Evidence Act</i> 1958.	
“ Credit.”	“ Credit ” has the same meaning as in the <i>Credit Act</i> 1981.	
“ Dealer.”	“ Dealer ”—	
	(a) in relation to a sale of goods and services, means a person (not being the seller or an agent of the seller acting with the authority of the seller) by whom or on whose behalf any antecedent negotiations are conducted ; and	15
	(b) in relation to a lease, means a person (not being the lessor or an agent of the lessor acting with the authority of the lessor) by whom or on whose behalf any antecedent negotiations are conducted.	20
“ Discharge.”	“ Discharge ” in relation to a sale means discharge of the sale so far as it is executory, otherwise than by frustration.	25
“ Goods.”	“ Goods ” includes all chattels personal and fixtures severable from the realty other than things in action and money.	30
“ Hire.”	“ Hire ” includes grant a licence to use.	
“ Lease.”	“ Lease ” means a contract for valuable consideration for the hiring of goods to a person, being a contract made on or after the date of commencement of this Part.	
“ Lessee.”	“ Lessee ” in relation to a lease of goods means the person to whom the goods are hired under the lease.	35
“ Lessor.”	“ Lessor ” in relation to a lease of goods means the person who hires the goods to another person under the lease.	

“ Linked

- “Linked credit provider” has the same meaning as in the *Credit Act 1981*. “Linked credit provider.”
- “Prescribed” means prescribed by this Part or the regulations. “Prescribed.”
- 5 “Regulations” means regulations made under this Part. “Regulations.”
- “Rescission” in relation to a sale or lease means avoidance of the sale or lease as from its beginning. “Rescission.”
- “Sell” includes — “Sell.”
- 10 (a) in relation to goods, agree to sell ; and
(b) in relation to services, supply, provide, grant or confer, or agree to supply, provide, grant or confer, for a money consideration.
- “Seller” means a person who sells goods and services. “Seller.”
- 15 “Services” means services by way of—
(a) the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or fixtures on land ;
(b) the alteration of the physical state of land ; or
(c) the transportation of goods otherwise than for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported. “Services.”
Cf. *Trade Practices Act 1974 (C’w)*, s. 74.
- 20 (2) In this Part, unless the contrary intention appears, a reference to goods and services includes a reference to goods or services.
- 25 (3) In this Part—
(a) a reference to a condition in relation to a sale or lease is a reference to a term of the sale or lease the breach of which may give rise to a right to treat the sale or lease as repudiated ; and “Essential term.”
- 30 (b) a reference to a warranty in relation to a sale or lease is a reference to a term of the sale or lease the breach of which may give rise to a claim for damages but not to a right to treat the sale or lease as repudiated. “Subsidiary term.”
- (4) For the purposes of this Part—
- 35 (a) a person shall not be deemed to be aware of a fact, matter or circumstance by reason only that he has signed a document or writing stating that fact, matter or circumstance or stating that he is aware of that fact, matter or circumstance ; and
- 40 (b) a person shall be deemed to be aware of a fact, matter or circumstance if he has been informed of it in such a manner and in such circumstances as would reasonably

reasonably be expected to cause a reasonable person to become aware of the fact, matter or circumstance.

(5) A reference to the hiring of goods includes a reference to an agreement for the hiring of goods.

(6) In this Part— 5

(a) a reference to antecedent negotiations in relation to a sale of goods and services is a reference to any negotiations or arrangements conducted or made with the buyer by a person by which the buyer was induced to enter into the sale with the seller or which otherwise promoted the making of the sale ; 10

(b) a reference to antecedent negotiations in relation to a lease of goods is a reference to any negotiations or arrangements conducted or made with the lessee by a person by which the lessee was induced to enter into the lease with the lessor or which otherwise promoted the making of the lease ; and 15

(c) a reference to a person by whom any antecedent negotiations are conducted is a reference to a person by whom the negotiations or arrangements concerned are conducted or made. 20

(7) In this Part, unless the contrary intention appears, where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings. 25

Application of Part.

85. (1) In this Part, a reference to a sale is a reference to a contract of sale of, or an agreement to sell, goods and services where the cash price of the goods and services—

(a) is not more than \$15,000 ; or

(b) is more than \$15,000 and the goods and services are of a kind ordinarily acquired for personal, domestic or household use or consumption— 30

but does not include a reference to—

(c) a contract or agreement made before the date of commencement of this Part ; 35

(d) a contract of sale of, or an agreement to sell, goods where a buyer buys, or holds himself out as buying, the goods for the purpose of re-supply or, where the goods are raw materials or goods that are ordinarily acquired for the purposes of repairing or treating other goods or fixtures on land or being incorporated in other goods, for the purpose of— 40

(i) transforming them ; or

(ii) incorporating

(ii) incorporating them in other goods—

in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land ; or

5 (e) a contract of sale of, or an agreement to sell, services where the buyer of those services has contracted to provide those services, or goods and services including those services, to a third person.

10 (2) Subject to sub-section (3), “cash price” in sub-section (1) in relation to a sale of goods and services means the amount paid or payable by the buyer for the goods and services.

15 (3) Where under a contract of sale of, or an agreement to sell, goods and services, a buyer buys goods and services together with other property or services or with both other property and services and a specified price is not allocated to the goods and services in the contract or agreement, “cash price” in sub-section (1) in relation to the goods and services means—

20 (a) the price at which, at the time at which the contract or agreement is made, the buyer could have bought from the seller the goods and services without the other property or services or property and services;

25 (b) if, at the time at which the contract or agreement is made, the goods and services were not available for purchase from the seller except together with other property or services or property and services; the other property or services or property and services but, at that time, goods and services of the kind bought were available for purchase from another seller without other property or services—the lowest price at which the buyer could, at that time, reasonably have bought goods and services of that kind from another seller; or

30 (c) if, at the time at which the contract or agreement is made, goods and services of the kind bought were not available for purchase from any seller except together with other property or services or property and services—the value of the goods and services at that time.

35 (4) For the purposes of sub-section (1), without limiting by implication the meaning of the word “services” in section 84 (1), the obtaining of credit by a buyer in connexion with a contract of sale of, or an agreement to sell, goods and services shall be deemed to be the purchase by him of a service and any amount by which the cash price in relation to the sale or agreement is increased by reason of his so obtaining credit, shall be deemed to be the cash price payable by him for that service.

(5) In

- (5) In sub-section (1), a reference to the re-supply of goods bought from a person includes a reference to—
- (a) a supply of the goods to another person in an altered form or condition ; and
 - (b) a supply to another person of goods in which the 5 first-mentioned goods have been incorporated.
- (6) In this Part, a reference to a lease is a reference to a lease of goods in respect of which the cash price of the goods when the lease is made—
- (a) is not more than \$15,000 ; or 10
 - (b) is more than \$15,000 and the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (7) In sub-section (6), “ cash price ” in relation to a lease of goods— 15
- (a) where at the time the lease is made the goods are available for purchase from the lessor—means the lowest price at which the lessee might have bought the goods from the lessor ;
 - (b) where at the time the lease is made, the goods are 20 reasonably available for purchase but are not available for purchase from the lessor or are so available only together with other property or services and property and services—means the lowest price at which, at that time, the lessee could reasonably have bought 25 goods of that kind; or
 - (c) where at the time the lease is made, the goods are not available for purchase or are so available only together with other property or services—means the value 30 of the goods at that time.
- (8) Where an amount other than the sum of \$15,000 but not exceeding the sum of \$50,000 is prescribed by the regulations for the purposes of this section, a reference in this section to \$15,000 is a reference to the prescribed amount.
- (9) Where it is alleged in any proceeding under this Part or in 35 any other proceeding in respect of a matter arising under this Part that a sale or a lease is a sale or lease to which this Part applies, it shall be presumed, unless the contrary is established, that this Part applies to the sale or lease.
- (10) Notwithstanding anything to the contrary in this Part, 40 this Part applies to and in relation to—
- (a) a sale of goods, whether or not the contract of sale includes a sale of services; and
 - (b) a sale of services, whether or not the contract of sale includes a sale of goods. 45

DIVISION 2.—SALES.

86. (1) In a sale of goods, there is—

Terms implied
in sale of
goods as to
title, &c.

- 5 (a) an implied condition that in the case of a sale, not being an agreement to sell, the seller has a right to sell the goods and, in the case of an agreement to sell, the seller will have a right to sell the goods at the time when the property is to pass ;
- 10 (b) an implied condition that at the time the property in the goods is to pass, the goods will be free from any charge or encumbrance other than a charge or encumbrance of which the buyer is aware when the sale is made and subject to which the buyer has agreed to accept the goods ; and
- 15 (c) an implied warranty that the buyer will enjoy quiet possession of the goods except insofar as it may be disturbed by a person entitled to the benefit of a charge or encumbrance of which the buyer is aware when the sale is made and subject to which the buyer has agreed to accept the goods.

20 (2) Sub-section (1) does not apply to a sale of goods to which sub-section (3) applies.

(3) In a sale of goods where—

- 25 (a) it appears from the sale or is to be inferred from the circumstances of the sale that the seller intends to transfer only such right, title or interest as he or a third party may have ; and
- 30 (b) the buyer is aware when the sale is made that it is a sale under which the seller intends to transfer only such right, title or interest as he or a third party may have—

there is—

- 35 (c) an implied condition that, in the case of a sale, not being an agreement to sell, the seller has a right to transfer that right, title or interest in the goods and, in the case of an agreement to sell, the seller will have a right to transfer that right, title or interest in the goods at the time when the property is to pass ;
- 40 (d) an implied condition that, when the property is to pass, there will be no other right, title or interest in the goods of which, when the sale is made, the seller is aware but the buyer is not aware ;
- 45 (e) an implied condition that at the time the property in the goods is to pass the goods will be free from any charge or encumbrance other than a charge or encumbrance subject to which the buyer has agreed to accept the goods ; and

(f) an

- (f) an implied warranty that—
- (i) the seller ;
 - (ii) in a case where the parties to the contract intend that the seller should transfer only such right, title or interest as a third person may have—that person ; and 5
 - (iii) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance subject to which the buyer has agreed to accept the goods— 10
- will not disturb the buyer's quiet possession of the goods.

Sales of goods
by description.

87. In a sale of goods sold by description there is an implied condition that the goods will correspond with the description and, if the sale is by sample as well as by description, it is not sufficient that the goods correspond with the sample if the goods do not also correspond with the description. 15

Sales of goods
by sample.

88. (1) In a sale of goods—
- (a) where— 20
 - (i) the seller ; or
 - (ii) in the course of any antecedent negotiations, a dealer or a person acting on behalf of the seller—

shows to the buyer a sample of goods and the buyer is induced by the showing of the sample to purchase the goods or goods of the same kind ; or 25

- (b) in which there is a term, express or implied, to the effect that the sale is a sale of goods by sample—

there is—

- (c) an implied condition that the goods will correspond with the sample in quality ; 30
- (d) an implied condition that the buyer will have a reasonable opportunity of comparing the goods with the sample ; and
- (e) an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample and of which the buyer is not aware when the sale is made. 35

(2) For the purposes of this section, a contract of sale of goods and services may be a sale by sample notwithstanding that the sample is not part of the bulk of the goods and services. 40

Merchantable
quality of goods
sold.

89. (1) In a sale of goods by a seller who sells the goods in the course of a business, there is an implied condition that the goods are of merchantable quality. 45

(2) For

(2) For the purposes of sub-section (1), goods are of merchantable quality if they are as fit for the purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to the price of the goods, the terms of the sale, the apparent condition of the goods when the sale is made and all other relevant circumstances.

(3) The condition in a sale of goods referred to in sub-section (1) does not extend to—

- 10 (a) defects of which the buyer is aware when the sale is made ; or
- (b) where the buyer has examined the goods or a sample of the goods before the sale is made—defects that the examination ought to have revealed.

15 90. Where, in a sale of goods by a seller who sells the goods in the course of a business, the buyer expressly or by implication— Fitness of goods for purpose.

- (a) makes known to the seller; or
- (b) in the course of any antecedent negotiations, makes known to a dealer or to a person acting on behalf of the seller—

20 the particular purpose for which the goods are required, there is an implied condition that the goods are reasonably fit for that purpose, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller, dealer or other person.

25 91. In a sale of services there is—

- (a) an implied condition that the services will be rendered with due care and skill ; and

30 (b) in the case of a sale of services by a person who sells services in the course of a business, an implied condition that the services are as fit for the purposes for which services of that kind are commonly bought as it is reasonable to expect having regard to the price of the services, the terms of the sale and all other relevant circumstances.

35 92. Where, in a sale of services by a person who sells the services in the course of a business, the buyer expressly or by implication— Fitness of services for purpose.

- (a) makes known to the seller; or
- (b) in the course of any antecedent negotiations, makes known to a dealer or to a person acting on behalf of the seller—

40 the particular purpose for which the services are required or the result that he desires the services to achieve, there is an implied condition that the services are reasonably fit for that purpose

or are

or are such as might reasonably be expected to achieve that result, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller, dealer or other person.

Sale of services
by
demonstration.

93. In a sale of services— 5
- (a) where—
- (i) the seller ; or
- (ii) in the course of any antecedent negotiations,
a dealer or a person acting on behalf of
the seller— 10
- shows to the buyer a demonstration of, or a result
achieved by, services and the buyer is induced by the
demonstration or by the showing of the result to buy
services of that kind ; or
- (b) in which there is a term express or implied to the effect 15
that the sale is a sale of services of the kind that are
shown to the buyer in a demonstration, or that
achieve a particular result shown to the buyer—
- there is—
- (c) an implied condition that the services will correspond 20
in nature and quality with the services shown in the
demonstration or will correspond in quality with the
services that achieved that result ; and
- (d) an implied condition that the services will be free 25
from any defect rendering them unfit for the purposes
for which services of that kind are commonly bought
that would not be apparent on reasonable examination
of the services shown in the demonstration or the
result achieved by services of that kind and of which
the buyer is not aware when the sale is made. 30

Terms implied
in sales of both
services and
goods.

94. (1) Where, in a sale that is a sale of both goods and services,
there is a term that—
- (a) would be a condition of the sale if it were a sale only
of the goods ; or
- (b) would be a condition of the sale if it were a sale only 35
of the services—

the term shall be treated for the purposes of this Part as a condition
unless, having regard to the sale as a whole, it is shown that the
term ought not to be treated as a condition of the sale.

(2) For the purposes of sub-section (1), a statement in a sale 40
to the effect that a term is not a condition does not of itself establish
that the term should not be treated as a condition.

(3) In

(3) In this section, a reference to a sale of goods includes a reference to the supply of materials in connexion with a sale of services.

5 95. (1) A term of a sale (including a term that is not set out in the sale but is incorporated in the sale by another term of the sale) that purports to exclude, restrict or modify or purports to have the effect of excluding, restricting or modifying—

Application of Part to sales not to be excluded or modified.

Cf. *Trade Practices Act* 1974, s. 68.

- 10 (a) the application in relation to that sale of all or any of the provisions of this Part;
- (b) the exercise of a right conferred by such a provision; or
- (c) any liability of the seller for breach of a condition or warranty implied by such a provision—

is void.

15 (2) A term of a sale shall not be taken to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with that provision.

96. A seller shall not include or permit to be included in a sale a provision that by reason of section 95 is void.

Penalty for including void provision.

Penalty : \$1,000.

20 97. (1) Subject to sub-section (3), a contract or provision in or that relates to a sale—

Liability for damages.

25 (a) that excludes, restricts or modifies or purports to have the effect of excluding, restricting or modifying liability for damages or limits or purports to have the effect of limiting the amount of damages that may be recovered by a buyer in respect of a breach by a seller of a condition or warranty implied by this Part in a sale ;

30 (b) that requires a buyer to indemnify a seller in respect of damages payable for breach of a condition or warranty implied by this Part in a sale ; or

35 (c) that provides that a buyer is not entitled to damages, or is entitled only to a limited amount of damages, in respect of a breach by a seller of a condition or warranty implied by this Part in a sale unless he takes such steps or follows such procedures as, but for the provision, a buyer would not reasonably be expected to take or follow—

is void.

40 (2) Subject to sub-section (3), where there is a contract or a provision in or relating to a sale of a kind referred to in sub-section (1), the seller is guilty of an offence and liable to a penalty not exceeding \$1,000.

(3) Subject

Limitation of liability for breach of condition or warranty.

(3) Subject to sub-sections (4) and (5), a term of a sale of goods and services, other than goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption, is not void under section 95 or this section by reason only that the term limits the liability of the seller for breach of a condition or warranty (other than a condition or warranty implied by section 86) to— **5**

- (a) in the case of goods, any one or more of the following :—
- (i) The replacement of the goods or the supply of equivalent goods ; **10**
 - (ii) The repair of the goods ;
 - (iii) The payment of the cost of replacing the goods or of buying equivalent goods ;
 - (iv) The payment of the cost of having the goods repaired ; or **15**
- (b) in the case of services—
- (i) the supply of the services again ; or
 - (ii) the payment of the cost of having the services supplied again.

(4) Sub-section (3) does not apply in relation to a term of a sale if the buyer establishes that it is not fair or reasonable for the seller to rely on that term of the sale. **20**

(5) In determining for the purposes of sub-section (4) whether or not reliance on a term of a sale is fair or reasonable, a court before which the matter falls to be considered shall have regard to all the circumstances of the case and in particular to the following matters : **25**

- (a) The strength of the bargaining positions of the seller and the buyer relative to each other, taking into account, among other things, the availability of equivalent goods and services and suitable alternative sources of supply ; **30**
- (b) Whether the buyer received an inducement to agree to the term or, in agreeing to the term had an opportunity of buying the goods and services or equivalent goods and services from any source of supply under a sale that did not include that term ; **35**
- (c) Whether when the sale was made the buyer was aware of the existence and extent of the term (having regard, among other things, to any custom of the trade or any previous course of dealing between the parties) ; and **40**
- (d) In the case of a sale of goods, whether the goods were manufactured, processed or adapted to the special order of the buyer.

Seller to have reasonable opportunity to make title or remove charge or encumbrance.

5 98. Where, in a sale of goods, the seller is in breach of an implied condition referred to in paragraph (a) or (b) of section 86 (1) or in paragraph (c), (d) or (e) of section 86 (3) or an express term to a similar effect, the buyer may not treat the sale as repudiated on the ground of the breach unless—

- 10 (a) he has given notice to the seller to the effect that he will treat the sale as repudiated unless the seller within a reasonable time provides the title to the goods required by the sale or removes the charge or encumbrance on the goods, as the case may be ; and
- (b) the seller has not, within a reasonable time after the notice was given, provided the title required by the sale or removed the charge or encumbrance, as the case may be.

15 99. (1) Where a sale of goods is not severable and the buyer has accepted the goods or part of the goods, the breach by the seller of a condition can only be treated as the breach of a warranty and not as a ground for rejecting the goods and treating the sale as repudiated unless there is a term of the sale, express or implied to that effect.

Effect of acceptance of goods.

- 20 (2) Notwithstanding section 42, where under a sale of goods—
- (a) the goods at the time of delivery to the buyer are defective in breach of a condition implied by this Part in the sale;
- 25 (b) the fact that they are so defective is apparent at that time or becomes apparent within a reasonable period after that time ; and
- 30 (c) the buyer has not done any act or thing by reason of which the goods cannot be returned to the seller in substantially the same state as they were in when they were delivered to the buyer—

the buyer shall not be deemed to have accepted the goods by reason only that he used the goods or that he did not within a reasonable period after it became apparent that the goods were defective

35 return the goods to the seller or inform the seller that the buyer had rejected the goods.

(3) Where goods have been delivered under a sale and the buyer, before accepting the goods, by agreement with the seller delivers them to the seller or to a person nominated by the seller

40 for repair or replacement, the buyer shall not be deemed to have accepted the goods within the meaning of section 42 until he has so accepted them after the delivery of the goods to him after the repair or replacement.

(4) This

(4) This section does not limit the time within which a buyer under a sale of goods may, by reason of the breach of a condition referred to in section 98, reject the goods and treat the sale as repudiated.

(5) Nothing in this section confers upon a buyer a right to treat a sale of goods as repudiated where the goods are rendered unmerchantable after delivery to the buyer or are damaged by abnormal use after delivery to the buyer.

Rescission for innocent misrepresentation.

100. (1) Where a buyer enters into a sale of goods after a misrepresentation that is not fraudulent is made to him and, if the misrepresentation had been fraudulent, the buyer would have been entitled to rescind the sale by reason of the misrepresentation, the buyer may rescind the sale by notice given to the seller before, or within a reasonable period after, acceptance of the goods.

(2) Sub-section (1) applies whether or not the misrepresentation has become a term of the sale.

Provision applicable to repudiation or rescission of sale of goods.

101. (1) Where a buyer—

(a) treats a sale of goods as repudiated by the seller on the ground of repudiation or breach of condition by the seller; or

(b) in accordance with section 100 (1) rescinds a sale after a misrepresentation that is not fraudulent is made—the following provisions apply :—

(c) Where the goods have been delivered to the buyer and have not been returned to the seller, the buyer shall return the goods to the seller or permit the seller to take possession of the goods ;

(d) The buyer is liable to the seller for loss or damage caused to the goods—

(i) by the buyer wilfully or by his negligence while the goods are in his possession during a period of 21 days after treating the sale as repudiated or rescinding the sale; and

(ii) by the buyer wilfully while the goods are in his possession after the expiration of a period of 21 days after treating the sale as repudiated or rescinding the sale ;

(e) Where the property in the goods passed to the buyer before he treated the sale as repudiated or rescinded the sale, the property re-vests in the seller;

(f) The seller is liable to the buyer for money paid and for the value of any other consideration paid or provided under the sale by the buyer to the seller ; and

(g) Where—

(g) Where—

(i) the buyer used the goods before he treated the sale as repudiated or rescinded the sale ; and

5 (ii) the seller acted honestly and reasonably in selling the goods—

the court by which the matter falls to be considered may if it considers it just to do so having regard to all circumstances of the case allow the seller to recover from the buyer an amount equal to the whole or any part of the fair value to the buyer of his use of the goods.

10 (2) Where a buyer purports to treat a sale of goods as repudiated or to rescind a sale of goods, the purported treating of the sale as repudiated or the rescission does not have any effect if—

(a) where the goods have been delivered to the buyer, the goods are not returned to the seller within a reasonable time after the buyer treated the sale as repudiated or rescinded the sale ; or

20 (b) the goods, after delivery to the buyer, have been rendered unmerchantable or have been damaged by abnormal use.

102. (1) In a sale of goods and services—

25 (a) a representation made to the buyer in the course of any antecedent negotiations by a dealer or by a person acting on behalf of the seller (otherwise than as an agent of the seller acting with the authority of the seller) confers on the buyer—

Liability of seller and person conducting antecedent negotiations. Cf. Hire-Purchase Act 1959 s. 6.

30 (i) as against the seller, the same right to rescind the sale and the same right of action in damages as he would have had if the representation had been made by an agent of the seller acting with the authority of the seller ;

35 (ii) as against the person by whom the representation was made, the same right of action in damages as he would have had if he had bought the goods and services from that person ; and

40 (iii) where the antecedent negotiations were conducted on behalf of another person, as against that other person the same right of action in damages as he would have had if he had bought the goods and services from that other person ; and

45 (b) a warranty

- (b) a warranty given to the buyer in the course of any antecedent negotiations by a dealer or by a person acting on behalf of the seller (otherwise than as an agent of the seller acting with the authority of the seller) confers on the buyer— 5
- (i) as against the person by whom the warranty was made, the same right of action in damages as he would have had if the warranty had been given in consideration of the buyer buying the goods and services from that person and the buyer had bought the goods and services from that person ; and 10
 - (ii) where the antecedent negotiations were conducted on behalf of a dealer, as against the dealer the same right of action in damages as he would have had if the warranty had been given in consideration of the buyer buying the goods and services from the dealer and the buyer had bought the goods and services from the dealer. 15 20
- (2) For the purposes of sub-section (1) it is immaterial whether or not the goods and services sold to the buyer were bought by the seller from a dealer by whom or on whose behalf any antecedent negotiations were conducted.
- (3) Nothing in this section prevents a statement being both 25
a representation and a warranty.
- (4) Nothing in this section confers upon a buyer an entitlement to an amount of damages arising from a representation or a warranty exceeding the amount of the loss suffered by the buyer.
- (5) Without prejudice to any other rights or remedies to which 30
a seller or a dealer may be entitled—
- (a) a seller is entitled to be indemnified—
 - (i) by a person by whom any antecedent negotiations were conducted who made a representation or gave a warranty ; and 35
 - (ii) by a dealer on whose behalf any antecedent negotiations were conducted by another person who made a representation or gave a warranty—

against any damage suffered by the seller by reason 40
of the operation of the provisions of this section ; and
 - (b) a dealer is entitled to be indemnified by a person who conducted any antecedent negotiations on behalf of the dealer and made a representation or gave a

warranty against any damage suffered by the dealer by reason of the operation of the provisions of this section.

5 (6) A contract or a provision in or that relates to a sale of goods and services that purports to have the effect of excluding, restricting or modifying the provisions of this section or purports to have the effect of precluding a right of action or a defence based upon or arising out of a representation or a warranty referred to in sub-section (1), is void.

10 (7) A seller or a person by whom or on whose behalf any antecedent negotiations are conducted shall not include or permit to be included in a sale a provision that by reason of sub-section (6) is void.

Penalty : \$1,000.

15

DIVISION 3.—LEASES.

103. In a lease of goods there is an implied condition that the lessor has a right to hire the goods to the lessee for the period of the lease.

Terms implied in leases as to right to hire.

20 104. In a lease of goods hired by description there is an implied condition that the goods will correspond with the description and, if the lease is by sample as well as by description it is not sufficient that the goods correspond with the sample if the goods do not also correspond with the description.

Leases of goods by description.

25 105. (1) In a lease of goods—
(a) where—

Leases of goods by sample.

(i) the lessor ; or

(ii) in the course of any antecedent negotiations, a dealer or a person acting on behalf of the lessor—

30 shows to the lessee a sample of goods and the lessee is induced by the showing of the sample to enter into a lease of the goods or goods of the same kind ; or

(b) there is, in the lease, a term, express or implied, to the effect that the lease is a lease of goods by sample—

35 there is in the lease—

(c) an implied condition that the goods will correspond with the sample in quality ;

40 (d) an implied condition that the lessee will have a reasonable opportunity of comparing the goods with the sample ;
and

(e) an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample and of which the lessee is not aware when the lease is made. 5

(2) For the purposes of this section, a lease of goods may be a lease by sample notwithstanding that the sample is not part of the bulk of the goods and services.

Merchantable
quality of goods
leases.

106. (1) In a lease of goods by a lessor who hires the goods to a lessee in the course of a business there is an implied condition that the goods are of merchantable quality. 10

(2) For the purposes of sub-section (1), goods are of merchantable quality if they are as fit for the purposes for which goods of that kind are commonly supplied as is reasonable to expect having regard to the price of the goods, the terms of the lease, the apparent condition of the goods when the lease is made and all other relevant circumstances. 15

(3) The condition in a lease referred to in sub-section (1) does not extend to—

(a) defects of which the lessee is aware when the lease is made ; or 20

(b) where the lessee has examined the goods or a sample of the goods before the lease is made—defects that the examination ought to have revealed.

Fitness of
leased goods
for purpose.

107. Where, in a lease of goods by a lessor who hires the goods to the lessee in the course of a business, the lessee expressly or by implication— 25

(a) makes known to the lessor ; or

(b) in the course of any antecedent negotiations, makes known to a dealer or to a person acting on behalf of the lessor— 30

the particular purpose for which the goods are required, there is an implied condition that the goods are reasonably fit for that purpose, except where the circumstances show that the lessee does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the lessor, dealer, or other person. 35

Application of
Part to leases
not to be
excluded or
modified.
Cf. Trade
Practices Act
1974, s. 68.

108. (1) A term of a lease (including a term that is not set out in the lease but is incorporated in the lease by another term of the lease) that purports to exclude, restrict or modify or purports to have the effect of excluding, restricting or modifying— 40

(a) the application in relation to that lease of all or any of the provisions of this Part;

(b) the

(b) the exercise of a right conferred by such a provision;
or

(c) any liability of the lessor for breach of a condition or warranty implied by such a provision—

5 is void.

(2) A term of a lease shall not be taken to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with that provision.

10 109. A lessor shall not include or permit to be included in a lease a provision that by reason of section 108 is void. Penalty for including void provision.

Penalty : \$1,000.

110. (1) Subject to sub-section (3), a contract or provision in, or that relates to, a lease— Exclusion of liability for damages.

15 (a) that excludes, restricts or modifies or purports to have the effect of excluding, restricting or modifying liability for damages or limits or purports to have the effect of limiting the amount of damages that may be recovered by a lessee in respect of a breach by a lessor of a condition implied by this Part in a lease ;

20 (b) that requires a lessee to indemnify a lessor in respect of damages payable for breach of a condition implied by this Part in a lease ; or

25 (c) that provides that a lessee is not entitled to damages, or is entitled only to a limited amount of damages, in respect of a breach by the lessor of a condition implied by this Part in a lease unless he takes such steps or follows such procedures as, but for the provision, a lessee would not reasonably be expected to take or follow—

30 is void.

(2) Subject to sub-section (3), where there is a contract or a provision of or relating to a lease of a kind referred to in sub-section (1), the lessor is guilty of an offence and liable to a penalty not exceeding \$1,000.

35 (3) Subject to sub-sections (4) and (5), a term of a lease of goods, other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption, is not void under section 108 or this section by reason only that the term limits the liability of the lessor for breach of a condition (other than a Limitation of liability for breach of condition.

40 condition implied by section 103) to any one or more of the following :—

(a) The replacement of the goods or the supply of equivalent goods ;

(b) The

- (b) The repair of the goods ;
- (c) The payment of the cost of replacing the goods or of hiring equivalent goods ;
- (d) The payment of the cost of having the goods repaired.

(4) Sub-section (3) does not apply in relation to a term of a lease if the lessee establishes that it is not fair or reasonable for the lessor to rely on that term of the lease. 5

(5) In determining for the purposes of sub-section (4) whether or not reliance on a term of a lease is fair or reasonable, a court before which the matter falls to be considered shall have regard to all the circumstances of the case and in particular to the following matters :— 10

- (a) The strength of the bargaining positions of the lessor and the lessee relative to each other, taking into account, among other things, the availability of equivalent goods and suitable alternative sources of supply ; 15
- (b) Whether the lessee received an inducement to agree to the term or, in agreeing to the term, had an opportunity of hiring the goods or equivalent goods from any source of supply under a lease that did not include that term ; 20
- (c) Whether when the lease was made the lessee was aware of the existence and extent of the term (having regard, among other things, to any custom of the trade or any previous course of dealing between the parties) ; and 25
- (d) Whether the goods are manufactured, processed or adapted to the special order of the lessee.

Rescission of lease for innocent misrepresentation.

111. (1) Where a lessee enters into a lease of goods after a misrepresentation that is not fraudulent is made to him and, if the misrepresentation had been fraudulent, the lessee would have been entitled to rescind the lease by reason of the misrepresentation, the lessee may rescind the lease by notice given to the lessor before, or within a reasonable period after, delivery of the goods. 35

(2) Sub-section (1) applies whether or not the misrepresentation has become a term of the lease.

112. (1) In a lease of goods—

- (a) a representation made to the lessee in the course of any antecedent negotiations by a dealer or by a person acting on behalf of the lessor (otherwise than as an 40

Liability of lessor and person conducting antecedent negotiations.

Cf. Hire-Purchase Act 1959 s. 6.

agent

agent of the lessor acting with the authority of the lessor) confers on the lessee—

- 5 (i) as against the lessor, the same right to rescind the lease and the same right of action in damages as he would have had if the representation had been made by an agent of the lessor acting with the authority of the lessor ;
- 10 (ii) as against the person by whom the representation was made, the same right of action in damages as he would have had if that person had hired the goods to the lessee ; and
- 15 (iii) where the antecedent negotiations were conducted on behalf of a dealer, as against the dealer, the same right of action in damages as he would have had if the dealer had hired the goods to the lessee ; and
- 20 (b) a warranty given to the lessee in the course of any antecedent negotiations by a dealer or by a person acting on behalf of the lessor (otherwise than as an agent of the lessor acting with the authority of the lessor) confers on the lessee—
- 25 (i) as against the person by whom the warranty was made, the same right of action in damages as he would have had if the warranty had been given in consideration of the lessee entering into a lease of the goods from that person and the lessee had entered into a lease of the goods from that person ; and
- 30 (ii) where the antecedent negotiations were conducted on behalf of a dealer, as against the dealer, the same right of action in damages as he would have had if the warranty had been given in consideration of the lessee entering into a lease of the goods from the dealer and the lessee had entered into a lease of the goods from the dealer.
- 35
- 40 (2) For the purposes of sub-section (1), it is immaterial whether or not the goods hired to the lessee were bought by the lessor from a dealer by whom or on whose behalf any antecedent negotiations were conducted.

45 (3) Nothing in this section prevents a statement being both a representation and a warranty.

(4) Nothing

(4) Nothing in this section confers upon a lessee an entitlement to an amount of damages arising from a representation or warranty exceeding the amount of the loss suffered by the lessee.

(5) Without prejudice to any other rights or remedies to which a lessor or a dealer may be entitled—

(a) a lessor is entitled to be indemnified—

(i) by a person by whom any antecedent negotiations were conducted who made a representation or gave a warranty ; and

(ii) by a dealer on whose behalf any antecedent negotiations were conducted by another person who made a representation or gave a warranty—

against any damage suffered by the lessor by reason of the operation of the provisions of this section ; and

(b) a dealer is entitled to be indemnified by a person who conducted any antecedent negotiations on behalf of the dealer and made a representation or gave a warranty against any damage suffered by the dealer by reason of the operation of the provisions of this section.

(6) A contract or a provision in or that relates to a lease of goods that purports to have the effect of excluding, restricting or modifying the provisions of this section or purports to have the effect of precluding a right of action or a defence based upon or arising out of a representation or a warranty referred to in sub-section (1), is void.

(7) A lessor or a person by whom or on whose behalf any antecedent negotiations are conducted shall not include or permit to be included in a lease a provision that by reason of sub-section (6) is void.

Penalty : \$1,000.

DIVISION 4.—GENERAL.

Implied terms do not negative express terms unless inconsistent.

113. A condition or warranty implied by this Part in a sale or a lease does not negative an express term in the sale or lease except in so far as the express term is inconsistent with the implied condition or warranty.

Limit of liability of guarantors.

114. (1) Where there is a contract of guarantee in relation to the performance of the obligations of a buyer under a sale or of a lessee under a lease, the liability of the guarantor in relation to the performance of those obligations does not include liability in respect of an amount exceeding the sum of—

(a) the amount for which the buyer or lessee is liable by reason of the breach of the sale or lease ; and

(b) the

(b) the reasonable costs of and incidental to enforcing the contract of guarantee.

(2) Subject to sub-section (3), a guarantor of the obligations of a buyer under a sale or of a lessee under a lease where the buyer or lessee is a minor is liable under the contract of guarantee to the same extent as he would be liable if the buyer or lessee had not been a minor when the sale or lease was made.

(3) Sub-section (2) does not apply with respect to a contract of guarantee unless, when it was made, it included a prominent statement immediately above or below the place where the guarantor signed the contract to the effect that a person who enters into a guarantee in respect of the obligations of a buyer or a lessee who is a minor may not have a right to recover from the buyer or lessee amounts that the guarantor is liable to pay under the sale or lease.

(4) In this section—

“Guarantee” includes indemnity.

“Guarantor” means a person who enters into a contract of guarantee in respect of the performance of the obligations of a buyer under a sale or of a lessee under a lease or of a person who enters into a contract of indemnity in relation to a sale or a lease but does not include—

(a) a person who is the seller, or spouse of the seller of goods and services to which the sale or lease relates or, where the seller is a body corporate, a person who is a director or an officer of the body corporate or is a related corporation within the meaning of the *Companies Act* 1961 or a director or an officer of a related corporation or spouse of such director or officer ; or

(b) a person who enters into a contract of guarantee or a contract of indemnity in respect of the obligations under a sale or a lease of a person who deals in goods and services of the kind to which the sale or lease relates.

115. Where a mortgage, charge, pledge or other security is provided by a person to secure the obligations of a buyer under a sale or of a lessee under a lease, the amount secured in respect of the liability of that person in respect of those obligations does not exceed liability in respect of the sum of—

Limit of liability under security.

(a) the amount for which the buyer or lessee is liable by reason of the breach of the sale or lease ; and

(b) the

(b) the reasonable costs of, and incidental to, enforcing the mortgage, charge, pledge, lien or other security.

Sale not illegal, &c.

116. (1) A sale or a lease is not illegal, void or unenforceable by reason only that the seller or lessor is guilty of an offence under this Part.

5

(2) Where a seller or a lessor commits an offence referred to in sub-section (1), the buyer or lessee does not, by reason only of having been a party to the sale or lease, aid, abet, counsel or procure the commission of the offence.

Application of Part.

117. This Part applies (notwithstanding anything to the contrary in any other Act or law) to and in respect of a sale or lease made after the commencement of this Part where—

10

(a) in the case of a sale, the goods and services are, or are to be, delivered or supplied in Victoria ; or

(b) in the case of a lease, the goods are, or are to be, supplied in Victoria.

15

Application of other Parts of Act to sales and leases.

118. (1) The provisions of section 16 (3), sections 17 and 18, section 19 (a) and (b) and section 20 do not apply to sales to which this Part applies.

(2) Section 4 (2) shall be deemed to apply to and in relation to this Part as if the reference to "Part" were a reference to Part IV. and the reference to contracts for the sale of goods included a reference to leases of goods.

20

(3) A reference in Part I. to a condition includes a reference to a condition within the meaning of this Part.

25

(4) A reference in Part I. to a warranty includes a reference to a warranty within the meaning of this Part.

(5) Except as otherwise expressly provided by this Part, nothing in this Part affects the application to sales of this or any other Act or law.

30

Regulations.

119. The Governor in Council may make regulations for or with respect to prescribing any matter or thing authorized or required to be prescribed for the purpose of this Part.

Amendment of No. 6265 s. 42. Acceptance.

3. In section 42 of the Principal Act after the words " he has accepted them, or " there shall be inserted the expression " , subject to section 41, " .

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